

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

FILED

11/30/2020

**JOAN M. GILMER
CIRCUIT CLERK
ST. LOUIS COUNTY**

PELOPIDAS, LLC, et al.,)	
)	
Plaintiffs/Counterclaim)	
Defendants,)	CASE NO: 20SL-CC01001
)	
v.)	DIVISION: 8
)	
RACHEL KELLER)	
)	
Defendant/Counterclaim)	
Plaintiff,)	

FIRST AMENDED JUDGMENT AND ORDER

This matter is before the Court on the parties' cross motions for summary judgment regarding the first amended petition and counterclaim.

The genesis of this litigation is contained in St. Louis County Circuit Court, Cause Number 16SL-CC00674, styled *RACHEL KELLER V. PELOPIDAS, LLC ET AL.*¹ On September 30, 2019, the parties participated in court ordered mediation with Bradley A. Winters as mediator. On that date the parties entered into a "Memorandum of Settlement" purporting to be a settlement of claims raised in that lawsuit. On December 11, 2019, the parties filed a joint memorandum indicating, ". . . there is no need for a ruling on the pending motions in this case and that the Parties are in the process of memorializing their agreement to settle this case." Twenty-three (23) days later, on January 3, 2020, counsel

¹ The Court on its own motion has taken judicial notice of this file.

for Mr. Brown filed a motion to compel settlement alleging, “The parties have reached an impasse as to the actual language to be agreed upon to implement the Settlement Agreement signed on September 30, 2019.” Said motion was set for hearing on January 31, 2020. Prior to that motion being heard, Ms. Keller filed a notice of voluntary dismissal on January 10, 2020 indicating, “In compliance with her obligations under the parties’ enforceable agreement of September 30, 2019 and in exchange for the consideration described therein, Plaintiff Rachel Keller hereby dismisses without prejudice the above-captioned lawsuit against Defendant Travis Brown.”²

Thereafter, on February 21, 2020, Plaintiffs/Counterclaim Defendants [hereinafter Pelopidas] filed the initial petition in this case seeking among other things, to enforce the September 30, 2019 settlement, breach of contract, and request for injunction.³ On March 6, 2020, the Honorable Stanley Wallach, Division 12, denied Plaintiff’s Motion for Preliminary Injunction and set the Motion for Permanent Injunction on April 3, 2020. On March 18, 2020, Defendant/Counterclaim Plaintiff [hereinafter Keller] filed an Application for Change of Judge from Judge Wallach. The case was reassigned to this Court on March 23, 2020. Subsequently, Defendant filed her counterclaim on April 16, 2020, asserting claims for breach of contract pertaining to the Memorandum of Settlement.

On July 22, 2020, Keller filed her motion for summary judgment on her counterclaim against Pelopidas, along with suggestions in support of the motion and a

² This dismissal without prejudice removed the Court’s jurisdiction to rule on Defendant’s motion to enforce the settlement. *Hibbs. V. Keith*, 582 S.W.3d 167 (Mo. App. W.D. 2019).

³ Plaintiff’s First Amended Petition was filed on April 6, 2020.

statement of uncontroverted facts. Six (6) days later Pelopidas filed their motion for summary judgment on all counts of the first amended petition and affirmative defenses alleged in the answer along with suggestions in support of the motion and a statement of uncontroverted facts. On August 21, 2020, Pelopidas filed their suggestions in opposition to the motion for summary judgment on the counterclaim and a response to the statement of uncontroverted facts. On August 27, 2020, Keller filed her cross-motion for summary judgment on Pelopidas' first amended petition, a memorandum in opposition to Pelopidas' motion for summary judgment, and a response to the statement of uncontroverted facts. Keller filed her reply in support of her motion for summary judgment on the counterclaim on September 8, 2020. Finally, on September 25, 2020, Pelopidas filed their combined reply in support of their motion for summary judgment and response to Keller's cross motion for summary judgment along with a response to Keller's statement of additional and uncontroverted facts and statement of additional facts. Due to the constraints of the pandemic and the operating phase of the 21st Judicial Circuit, oral argument was conducted by WebEx on September 29, 2020 with both parties presenting power-point assisted arguments.

Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. Rule 74.04. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. *ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Corp.*,

854 S.W. 2d 371, 376 (Mo. banc 1993). A material fact in the context of summary judgment is one from which the right to judgment flows. *Id.*

A defending party may establish a right to summary judgment by demonstrating: (1) facts negating any one of the elements of the non-movant's claim; (2) that the non-movant, after an adequate period for discovery, has not been able and will not be able to produce sufficient evidence to allow the trier of fact to find the existence of any one of the elements of the non-movant's claim; or (3) that there is no genuine dispute as to the existence of the facts necessary to support movant's properly pleaded affirmative defense. *Id.* Each of these three methods individually establishes the right to judgment as a matter of law. *Id.*

The question of whether the parties entered into an enforceable settlement agreement is governed by contract law. *Emerick v. Mutual Benefit Life Insurance Co.*, 756 S.W.2d 513, 518 (Mo. banc 1988). To show a legal, valid settlement agreement, one must prove the essential elements of a contract: offer, acceptance and consideration. *Tinucci v. R.V. Evans Co.*, 989 S.W.2d 181, 184 (Mo. App. E.D. 1998). The creation of a valid settlement agreement requires a meeting of the minds and a mutual assent to the essential terms of the agreement. *Ste. Genevieve County Levee District v. Luhr Brothers, Inc.*, 288 S.W. 3d 779, 783 (Mo. App. E.D. 2009). By each party's admission in their pleadings, they entered into an enforceable settlement agreement evidenced by the Memorandum of Settlement. The parties agree that they resolved their dispute on September 30, 2019, by entering into an enforceable contract. They further agree that the Settlement Memorandum contains all of the essential terms of their contract.

A contract will be valid and enforceable even if some terms may be missing or left to be agreed upon as long as the essential terms are sufficiently definite to enable the court to give them exact meaning. *Vulgamott v. Perry*, 154 S.W.3d 382, 390-91 (Mo. App. W.D. 2004). The terms of the Memorandum of Settlement established the essential provisions of the agreement between the parties. Though the Memorandum of Settlement did not supply whether Keller agreed to transfer ownership of her 50% ownership of Pelopidas to Brown effective September 30, 2019, this does not render the entire agreement unenforceable as the court is capable of supplying this provision based on the evidence in the record. The parties intent is evidenced by the plain and ordinary language used in the Memorandum as well as their actions following its execution on September 30, 2019. The Parties intent is the sole and *narrow* issue before the Court.

Upon argument of the parties, the Court's review of the parties' various motions and memoranda, and the Court's analysis of relevant authority, the Court finds that there is no genuine dispute between the parties as to the material facts upon which Plaintiff would have had the burden of persuasion at trial, and Plaintiff has established undisputed facts establishing every element of its claim. *See Public School Retirement System of Missouri v. Taveau*, 316 S.W.3d 338, 341-42 (Mo. Ct. App. W.D. 2010). The parties agree the Memorandum is a valid and enforceable contract containing all essential terms.

The Court finds that: 1) The September 30, 2019, Memorandum of Settlement between the parties was a valid and enforceable contract; 2) No additional documents or terms are needed to effectuate the contract; 3) Plaintiffs performed or tendered performance

pursuant to the contract; 4) Defendant surrendered, transferred and assigned all right, title and interest in Pelopidas, LLC effective September 30, 2019;

JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED,
as follows:

1. Plaintiff / Counterclaim Defendant's motion for summary judgment is **SUSTAINED**;
Judgment is hereby entered in favor of Plaintiff / Counterclaim Defendant Travis Brown and Pelopidas and against Defendant / Counterclaim Plaintiff Rachel Keller;
2. Defendant / Counterclaim Plaintiff's motion for summary judgment is **DENIED**.
3. Defendant / Counterclaim Plaintiff's motion for summary judgment on counterclaim is **DENIED**; Counterclaim is dismissed with prejudice.
4. Defendant / Counterclaim Plaintiff is permanently enjoined from making statements to the effect that she was an owner or Member of Pelopidas, LLC after September 30, 2019;
5. No later than ~~November~~December 30~~7~~, 2020 the Parties shall execute the settlement agreement reflecting this judgment and whereupon the \$1,100,000.00, the April 1, 2020, scheduled payment, currently being held in escrow at St. Louis Title shall be paid to Keller.
6. The settlement agreement, enforcement of which is the subject of this lawsuit, authorizes attorney's fees to the prevailing party "... if a party sues to enforce settlement agreement, release or buy-sell documents." Paragraph 19 of Exhibit 1. Factors that trial courts should consider when making a determination as to reasonable attorney fees

include: (1) the rates customarily charged by the representing attorneys and local attorneys who handle similar work; (2) the number of hours reasonably spent on the litigation; (3) the nature of the services provided; (4) the degree of necessary professional expertise; (5) the nature and importance of the subject matter; (6) the amount involved or the result obtained; and (7) the vigor of the opposition.

Proof of attorney fees has been submitted by the Plaintiffs in a hearing held on November 18, 2020 including affidavits from counsel of record. Based upon this uncontroverted evidence the Court finds that the fees as submitted were reasonable and necessary in the context of this case.

The Court enters Judgment in favor of Travis Brown as and for attorneys' fees and expenses against Rachel Keller per the Settlement Agreement of September 30, 2019 in the amount of \$202,453.50 to Capes, Sokol, Goodman, & Sarachan, P.C. and \$42,300 to the Law Offices of Ted Frapolli.

The Court enters Judgment in favor of Pelopidas, LLC as and for attorneys' fees and expenses against Rachel Keller per the Settlement Agreement of September 30, 2019 in the amount of \$163,578 to the firm of McCarthy, Leonard & Kaemmerer, L.C.

7. All claims not specifically enumerated in this Judgment are denied.
8. Taxable costs are assessed against Defendant / Counterclaim Plaintiff.

SO ORDERED,



Dean P. Waldemer, Judge
Division 8
Circuit Court of St. Louis County

Dated: November 30, 2020